United Nations

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 908

Case No. 994: BAGHOUD

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas at the request of Raghda Baghoud, a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended to 28 February 1998, the time-limit for the filing of an application to the Tribunal;

Whereas, on 1 December 1997, the Applicant filed an application requesting the Tribunal:

"[To order:]

a. Rescission of the disciplinary action taken against [the] Applicant, and reinstat[ement] to her previous post, grade and step including [payment of the] difference of annual increments.

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b. Payment of compensation for the injury and hardship sustained by [the] Applicant.

c. Payment of counselling fees and secretarial expenses estimated at US $600."

Whereas, on 7 February 1998, the Applicant filed an additional document;

Whereas the Respondent filed his answer on 13 May 1998;

Whereas the Applicant filed written observations on 30 June 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Agency on 21 November 1987, on a temporary assistance basis as Senior Midwife, at the grade 6 level, at the Jaramana Health Centre in the Syrian Arab Republic (SAR). On 1 March 1988, she was granted a temporary indefinite appointment as an area staff member in that same post. On 1 August 1991, she was transferred with promotion to the post of Staff Nurse, at the grade 8 level, at the Yarmouk MCH Sub-Centre. On 15 February 1992, the Applicant was suspended with pay pending investigation of alleged misconduct. On 20 April 1992, she was reinstated and transferred to the Jouber Health Centre. On 1 June 1995, the Applicant was transferred, on demotion, to the post of Senior Practical Nurse (Dental) at the grade 6 level, at the Yarmouk Health Centre. On 20 January 1996, the Applicant was transferred to the post of Senior Midwife, at the grade 6 level, at the Hussaineyyah Health Centre.

During a visit to the Jouber Health Centre on 7 May 1995, the Field Disease Control Officer discovered that the number of children registered as having been vaccinated with Hepatitis B vaccine exceeded the actual number of vaccines consumed. The Applicant was subsequently called to a meeting with the Chief and the Deputy Chief, Field Health Programme, and the Field Nursing Officer. On that occasion, she admitted that she had recorded false numbers of children vaccinated in an attempt to reduce the wastage rate of the vaccine.

On 21 May 1995, the Applicant confirmed in writing that she had intentionally registered imaginary and incorrect numbers of vaccinated children, and that the number of children actually vaccinated was less than she had registered.

On 31 May 1995, the Field Administration Officer sent the Applicant a letter of censure, by which he also informed her that she was being transferred with demotion to the post of Senior Practical Nurse (Dental) at the grade 6 level, at the Yarmouk Health Centre, with effect from 1 June 1995.

On 26 June 1995, the Applicant wrote to the Field Administration Officer, requesting a review of the decision to transfer her on demotion. On 28 June 1995, the Director of UNRWA Operations, SAR, informed the Applicant that, after reviewing her case and personal file, he was satisfied that the decision to transfer her on demotion should stand.

On 8 July 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 19 March 1997. Its evaluation and recommendation read, in part, as follows:

"**III. EVALUATION ...**

...

> (c) The Board noted that the Appellant admitted that she registered false numbers of vaccinated children, and that the number of children vaccinated was less [than] that registered was [an] attempt to reduce the wastage rates of vaccines.
>
> Moreover, the Board believes that the Appellant did not benefit from these actions nor did she cause harm to anyone. Therefore, the Board resolved the three disciplinary measures taken, the first a letter of censure, then transfer, and then demotion, were obviously more than the action deserved.
>
> (d) By reference to the Appellant's personal file, the Board noted that the Appellant had a satisfactory performance and the fact that she was promoted to grade 08 does indicate that she was a good worker.

(e) In this context the Board is of the opinion that the Administration's decision was too harsh for the action committed.

IV. RECOMMENDATION

14. In view of the foregoing and without prejudice to any further oral or written submission ..., the Board unanimously makes its recommendation that the administrative decision appealed against be reviewed with a view to returning the Appellant back to her original grade and step at the time of her demotion."

On 3 June 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed her as follows:

"... I have carefully reviewed the Board's report and noted its conclusions. The Board was of the opinion that your actions did not benefit you, nor cause harm to anyone. In the light of your otherwise satisfactory performance, the Board was of the opinion that the disciplinary measures taken were too harsh and recommended that your appeal be allowed and that you be re-transferred to your post at your former grade and step.

I disagree with the Board's conclusions. Your explanation for falsifying Agency records was that you wanted to give a favourable (but untrue) picture of the wastage rates for the vaccine. I presume that thereby you hoped to avoid criticism or to gain approval for your efficiency in relation to the vaccination programme; however, more importantly, by falsifying the data as to wastage, you were concealing inefficiencies which might have resulted in improved vaccination procedures and a consequent saving in the Agency's health budget. It also might have resulted in the Agency distributing false data to the Donor Countries and to the Host Governments, thereby possibly undermining the Agency's credibility. Importantly also, it gave the Agency false data about the penetration of its vaccination programme. I do not consider that the action taken against you to be disproportionate in the circumstances. Accordingly, I reject the Board's conclusions and recommendation and I dismiss your appeal."

On 1 December 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision of the Respondent is vitiated by mistake of fact. Contrary to the Respondent's assertion, the Applicant was not "concealing inefficiencies which might have resulted in improved vaccination procedures." The Applicant did not inflate numbers of children vaccinated by a large amount, so the falsification of the data was insignificant.

2. The decision of the Respondent was vitiated by error of law. The Applicant did not have the intent to engage in misconduct. The Applicant should have been served with no more than a reprimand, if any disciplinary measure was to be imposed.

3. The Respondent's decision is vitiated by bias on the part of the Chief, Field Health Program.

Whereas the Respondent's principal contentions are:

1. The Applicant admitted that she deliberately falsified Agency records and was thus guilty of misconduct.

2. The disciplinary action taken was appropriate in the circumstances.

The Tribunal, having deliberated from 27 October to 20 November 1998, now pronounces the following judgement:

I. At all relevant times the Applicant held the post of Staff Nurse (grade 08) at the Jouber Health Centre. Her duties included the administration of Hepatitis B Vaccine to registered refugee children. Her duties also included the keeping of returns and records in relation to children to whom she had administered such vaccine. In his Visit Report to the Jouber Health Centre on 7 May 1995, the Field Disease Control Officer reported that the number of vaccinated children with Hepatitis B Vaccine (registered on the Daily Journal of Work) did not match the number of vaccine vials consumed at each session (i.e. the number registered was more than the number of vaccinated children).

II. As a result, the Applicant was called to the Field Office on 17 May 1995, for investigation of the case and questioning about what had been reported by the Field Disease Control Officer. In a "Note for the Record", the Field Disease Control Officer reported that the Applicant admitted recording "false numbers of vaccinated children on the Daily Journal of Work (i.e. more than the actual numbers) in an attempt of [sic] her to reduce the wastage rates of vaccines." On 21 May 1995, she signed a statement (which was in Arabic, her native language), the translation of which reads as follows:

> "I, the undersigned, ..., admit and confess that I have registered imaginary and incorrect numbers of children vaccinated against hepatitis. The actual numbers of vaccinated children is less than the registered number. I did this deliberately, in an attempt to reduce the percentage of wasting the vaccines".

III. Disciplinary action was initiated. It resulted in a letter dated 31 May 1995, from the Field Administration Officer, Syria, to the Applicant, which noted that the Applicant had admitted during questioning that she "had been recording false numbers of vaccinated children, attempting thereby to reduce the wastage rate of vaccine" and that she had admitted this in writing on 21 May 1995. She was informed that the letter was a letter of censure and that she would be transferred, on demotion, to the post of Senior Practical Nurse (Dental), at grade 06, effective 1 June 1995.

IV. The Applicant appealed against that disciplinary decision to an Area Staff Joint Appeals Board (JAB). The JAB noted that she had admitted that she had registered larger numbers of vaccinated children than those actually vaccinated, in an attempt to reduce the wastage rate of vaccines. The JAB accepted that the Applicant had not benefitted from those actions nor had she caused harm to anyone and that the letter of censure, the transfer and the demotion were more than her actions deserved. It recommended that the administrative decision appealed against be reviewed with a view to returning the Appellant back to her original grade and step as of the time of her demotion.

The Commissioner-General, having considered the report of the JAB, expressed disagreement with the Board's conclusion and recommendation. He added:

> "Your explanation for falsifying Agency Records was that you wanted to give a favourable (but untrue) picture of the wastage rates for the vaccine. I presume that thereby you hoped to avoid criticism or to gain approval for your efficiency in relation to the vaccination programme; however, more importantly, by falsifying the data as to wastage, you were concealing inefficiencies which might have resulted in improved vaccination procedures and a consequent saving in the Agency's health budget. It also might have resulted in the Agency distributing false data to the Donor Countries and to the Host Governments, thereby possibly undermining the Agency's credibility. Importantly also, it gave the Agency false data about the penetration of its vaccine programme. I do not consider that the action taken against you to be disproportionate in the circumstances. Accordingly, I reject the Board's conclusions and recommendation and I dismiss your appeal."

V. The Applicant appeals against that decision to the United Nations Administrative Tribunal.

VI. In her application, the Applicant makes a somewhat different case or gives a somewhat different explanation for her actions than that which she gave to her superiors on 17 May 1995, and in her written statement of confession dated 21 May 1995. She claims that since any portion of a vial of vaccine that has been opened, which is not used immediately, would have to be discarded, she used this surplus, which otherwise would have been wasted, to vaccinate unregistered children. Thus, she now asserts, she had included the names of unregistered children in her daily work record, which should only have contained the names of registered children, who were entitled to vaccination under the particular programme. She also claims that she had volunteered information as to what she was doing and why she was doing it to the Field Disease Control Officer, on his visit to the Jouber Health Centre on the 7 May 1995, but again there is no evidence to support this assertion nor was there any document to this effect apparently included in the papers which had been furnished to the JAB.

VII. The Tribunal is satisfied that whatever the true version, it is beyond controversy that she was intentionally and knowingly falsifying the contents of her register of the Daily Journal of Work, being the official records kept in relation to the programme, and that this might have had the serious consequences mentioned by the Commissioner-General in his letter to the Applicant dated 3 June 1997, as quoted above.

VIII. The Applicant submits that the decision of the Respondent to censure and to transfer on demotion the Applicant, as a disciplinary measure, is vitiated by alleged mistakes of fact, errors of law and indications of bias. In support of these contentions, she firstly asserts that she cannot have known or believed that what she was doing was wrong because it was she who took the initiative to discuss the discrepancy of the procedures with the Field Disease Control Officer on 7 May 1995. Whilst there is no evidence that it was she who took such an initiative or that she had volunteered the information to the Field Disease Control Officer, the Tribunal is prepared to deal with this application on the assumption that this was so. Even if it was so, it is clear that the accuracy of the records was the subject matter of the Field Disease Control Officer's inquiry and that it was in that context that the matter was raised. The Tribunal is therefore satisfied that, even if the Applicant had volunteered the information which she says she provided, this afforded the Applicant no excuse for her actions nor does it demonstrate that the version she now gives is the true one. The Tribunal is satisfied that she must have known that what she was doing was wrong and that, as a nurse, she must have known that her actions could have serious consequences. Even if the version that she now alleges is the correct one, that she was using vaccine, which would otherwise have been wasted, on unregistered children, this could have had serious consequences not only in the manner stated by the Respondent in his letter of 3 June 1997. If she had been vaccinating unregistered children, this, in itself, could have resulted in contra-indicated medical treatment being subsequently afforded to those children, if they had been vaccinated but no record thereof had been kept in relation to *their* medical records.

IX. On either version, the Tribunal is satisfied that the falsification of records, even if done without adverting to the possible consequences or without intending to cause possible harm, would have inevitably been considered as either wilful misconduct, irresponsible conduct or wilful failure on the part of the Applicant to perform her assigned duties, of such a nature as would have warranted disciplinary measures being taken against her. To falsify records of this nature, be it to conceal the true extent of the wastage of vaccine or to vaccinate children not registered as being entitled to be vaccinated under the programme, is not, in the opinion of the Tribunal, capable of being considered as mere innate inefficiency or incapacity such as would, under area staff rule 110.1, warrant appropriate administrative action, rather than disciplinary measures.

X. Subparagraph 4.3. of personnel directive A/10/Rev.1/Amend.1 categorizes an instance where disciplinary measures would normally be imposed as wilful or irresponsible failure to comply with contractual obligations. The Tribunal is satisfied that the Applicant had a duty to keep proper and accurate records and that she wilfully and irresponsibly failed to do so.

XI. The Applicant argues that the Respondent was in breach of paragraph 4.4. of personnel directive A/10/Rev.1/Amend.1 in that he failed in his obligation to maintain consistent patterns of disciplinary action for similar types of offences. She alleges that other nurses concealed losses or wastage of vaccine and that the Respondent's records establish this, but that no other nurses have been disciplined in relation to what they have done. No evidence has been furnished in support of this allegation. No instance has been given as to any other nurse having been found to have falsified records and let off without disciplinary measures being taken against such person.

XII. The Applicant further argues that the Respondent failed to comply with the provisions of paragraph 4.5 of personnel directive A/10/Rev.1/Amend.1 which provides in

the first sentence that "disciplinary measures should normally be imposed in a progressive fashion as outlined in Paragraph Six below". This is the only portion of the subparagraph quoted in the Applicant's submission. However, the subparagraph continues as follows in the second sentence: "However, the specific disciplinary action need not follow the programme sequence as outlined but will depend on the particular circumstances of the case". The forms of disciplinary measures set out in paragraph 6 are as follows:

(A) Written censure

(B) Suspension without pay

(C) Demotion

(D) Termination for misconduct

(E) Summary dismissal

XIII. The Tribunal is satisfied that there is no binding obligation to impose disciplinary measures in the sequence outlined above and that the decision cannot be impugned or invalidated on the grounds that the disciplinary action taken against the Applicant involved written censure and demotion, without an intervening period of suspension without pay.

XIV. The Applicant argues that the Respondent's conclusion that "by falsifying the data as to the wastage [the Applicant was] concealing inefficiencies which might have resulted in improved vaccination procedures" is controversial, in that no remedial steps or controls have been introduced since that time to reduce waste. She also takes issue with the Respondent's conclusion that it "might have resulted in the Agency distributing false data to the Donor Countries and to the Host Governments, thereby possibly undermining the Agency's credibility." The Applicant contends that this conclusion is equally controversial, because the number of vaccinations of registered children actually carried out by the Applicant as opposed to the number reported by her in her returns, is small and would be of no significance in relation to an epidemic. The Tribunal is satisfied that a mere statement that these conclusions were controversial provides the Applicant with no answer

to the entitlement of the Respondent to have determined to take disciplinary measures. The Tribunal is further satisfied that those conclusions were based on reason and that the Respondent was entitled to form the view which he so formed.

XV. The primary contention made on behalf of the Applicant is that the disciplinary measures which the Respondent took in relation to the Applicant were excessively harsh in all of the circumstances. The Tribunal will normally not interfere with a disciplinary decision taken on the grounds that it is excessively harsh, unless it is satisfied that it is so disproportionate or unwarranted as to amount to an injustice. The Tribunal will not substitute its own view as to the appropriateness of a disciplinary measure for that actually taken, unless it is satisfied that the measure actually taken could not in justice be said to be proportionate. The Tribunal is satisfied that the measures taken by the Respondent against the Applicant were not disproportionate and that the Respondent was entitled to take a serious view of the misconduct of the Applicant because of its potential consequences. The Tribunal is further satisfied that the argument that the seriousness of the conduct should be measured by the intention of the Applicant is misconceived and that *mens rea* is only one aspect to be considered in determining what disciplinary measure is appropriate in any particular circumstance. The Tribunal is satisfied that the Applicant wilfully falsified records in relation to her work and that the Respondent was entitled to take a serious view of her actions having regard to their potential consequences.

XVI. Allegations of bias have been made against the Respondent in that the Field Administration Officer, Syria, had had sight of and presumably considered the Field Disease Control Officer's Note for the Record concerning the investigation and the questioning of the Applicant, before the Field Administration Officer, Syria, took the initial decision to censure and to transfer the Applicant on demotion and before the Commissioner-General determined not to accept the JAB's conclusions and recommendations. The Applicant argues that the Note for the Record contained

misleading, irrelevant and prejudicial information of no probative value insofar as the charges against her were concerned, and that this prejudiced the decisions taken. This information was that "her records in the past three years have shown that her performance was of an unacceptable standard as she was subject to investigation by a Board of Inquiry and in addition her relationships with staff members were of low standards". The Tribunal is satisfied that there is no evidence to support the Applicant's contention. The letters in the first instance from the Field Administration Officer, Syria, in which he sets out his reasons for his decision to censure the Applicant and transfer her with demotion and secondly, from the Commissioner-General, which stated why he was dismissing the Applicant's appeal and rejecting the conclusions and recommendations of the Board of Inquiry set out in detail why those decisions were made. It is clear from those letters that the decisions were based only on relevant facts, namely that the Applicant had falsified records. There is certainly no evidence of bias and none to suggest that the extraneous matters were taken into account or that they influenced either person adversely.

XVII. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary